



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 46 OF 2016

**In the matter of Alleged contravention of Rights or Fundamental
 Freedoms under Articles 19, 20, 21,23, 24, 25, 27, 28,
 29, 45 and 157 of the Constitution**

BETWEEN

D W T.....Petitioner

versus

B N T.....1st Respondent

W M T.....2nd Respondent

Mama Fatuma Goodwill Children Home.....3rd Respondent

British High Commission.....4th Respondent

JUDGMENT

The Parties

1. The Petitioner, a male adult of sound mind is an adopted son of the first and second Respondents while the third Respondent is alleged to be the children's home from where the Petitioner was adopted by the first and second Respondents.

The petitioners case

2. The Petitioner avers that he seeks to know his biological parents and circumstances of his adoption from the third Respondent. He avers that he lived with the first and second Respondents until he was 17 years when he was compelled by adverse treatment to leave their home. He avers that throughout his life in their household, he was treated materially different from other members of the family and that he was treated adversely. He also states that he was denied parental compassion, empathy, support and care.

3. He avers that sometimes in 2011, he was charged, tried and convicted of the offence of violently robbing the second Respondent. His appeal against the said conviction is pending in the Court of Appeal. He avers that during the trial and the pendency of the said appeal, he has not received any parental empathy, concern, support or compassion. This he states is because the first, second and third Respondents facilitated his adoption thereby depriving him parental support and compassion. He avers that on account of the criminal charges, the first and second Respondents have ascribed to him an "illegitimate" status. He avers that the first and second Respondents withdrew all their support to him including financial support. He states that they have declined his invitation to visit him in prison. Also, he states that the first Respondent has informed him that he will not inherit her.

4. He invokes Articles **19 (2)** and **20 (1)** of the Constitution and avers that his rights under Articles **27, 28** and **35** of the Constitution have been violated in that the adopting parents adopted him under circumstances unknown to him, yet they have denied him parental compassion, love, care and support and that the first, second and third Respondents have constructively made him a child of no one (*filius nullius*), which undermined his dignity, security of the person, and right not to be discriminated. As a consequence of the foregoing, he prays for the following reliefs from this court:-

a. ***A declaration*** that the Petitioner is part of the first and second Respondents family, despite not being their biological son and regardless of criminal proceedings against him and is consequently eligible to parental care, love and support and is entitled to enjoy the right to dignity, security of person, family and equality like other members of the family to the greatest extent possible.

b. ***A declaration*** that acts and omissions of the first, second and third Respondents enumerated in the Petition are a violation of the Petitioner's rights to dignity, equality, security of person and family as recognized and contemplated by Articles **27, 28, 29** and **45** of the Constitution.

c. ***In the alternative*** to (a) and (b), a order compelling the third Respondent to disclose the circumstances of his adoption as well as its assessment of the suitability of the first and second Respondents' to adopt the Petitioner granted their lack of care, compassion and support towards him.

d. ***Further to (c) above***, order of compensation by the first and second Respondents for violating the Petitioner's right under Articles **27, 28, 29** and **45** of the Constitution and for denying him a chance to enjoy parental care, love and compassion from his biological parents in view of the adoption.

First and Second Respondents' Notice of preliminary objection

5. The first and second Respondents' filed a notice of a preliminary objection on 4th November 2016 stating that:- **(i)** the amended Petition is bad in law for mis-joinder of causes of action and embarrassing to the first and second Respondents; **(ii)** that the petition does not disclose the alleged right violated under Article **35**; **(iii)** that the first and second Respondents have been wrongly joined in this Petition. On 5th April 2016, **Onguto J** directed that the preliminary objection be heard as part of the response to the Petition.

Third Respondent's Replying Affidavit

6. **Saad Miraji Khairallah**, a trustee of the third Respondent swore the Replying Affidavit filed on 27th January 2017. He avers that:- **(i)** that this Petition is aimed at scuttling the high court decision upholding the Petitioner's conviction and confirming lower courts findings that there was no evidence of bad blood between the first and second Respondents; **(ii)** that this Petition is an abuse of court process; **(iii)** that the third Respondent had no knowledge of the Petitioner prior to this case, hence, its joinder is an abuse of court; **(iv)** that the third Respondent is not in a position to identify the Petitioner's biological parents nor is it aware of his upbringing or childhood.

7. It is not clear why the fourth Respondent, the British High Commission was sued in this Petition. No

allegations have been made against the fourth Respondent at all. Kenya's jurisprudence courtesy of the application of the Vienna Convention on Diplomatic Relations and other Privileges and Immunities has over the years embraced absolute foreign immunity such that no suit can be entertained against a foreign sovereign without waiver by the foreign sovereign. This position has been affirmed by the Privileges and Immunities Act.^[1]

8. Also relevant is the case of *Ministry of Defence of the Government of the United Kingdom Vs. Ndegwa*^[2] in which the court rendered itself as follows:-

i. It is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived.

ii. Such persons and institutions include foreign sovereign or heads of state and government, foreign diplomats and staff and their staff, consular officers and representatives of international organizations such as the United Nations Organizations (UNO) and the Organization of African Unity (OAU).

iii. It is not all acts of a foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the sovereign or government is acting in a governmental capacity under which it can claim immunity or a private capacity, under which an action may be brought about it.

9. It is important to mention that section 4 (1) of the Privileges and Immunities Act^[3] provides for the application of the Vienna Convention set out in the first schedule of the act and the section specifically provides that the said convention shall have the force of law in Kenya. Consequently, the suit against the fourth Respondent is a non-starter.

Issues for determination

10. Upon analyzing the opposing facts presented in this Petition, I find that the following issues fall for determination, namely; **(a) Whether the Petitioner has established a case for the court to order that he be provided with information about his biological parents; (b) Whether this Petition is bad for mis-joinder of parties and for raising several causes of action; (c) Whether the Petitioner has demonstrated violation of his Fundamental Rights under Articles 27, 28, 29 and 45 of the Constitution.**

Whether the Petitioner has established a case for the court to order that he be provided with information about his biological parents

11. The Petitioner seeks to know his biological parents and circumstances of his adoption from the third Respondent. The relevant prayer reads *"In the alternative to (a) and (b), a order compelling the third Respondent to disclose the circumstances of his adoption as well as its assessment of the suitability of the first and second Respondents' to adopt the Petitioner granted their lack of care, compassion and support towards him."*

12. The Petitioners counsel submitted that the Petitioner requires the information to trace his familial links and lay claim to it, the circumstances of his adoption, and the assessment of the suitability of the first and second Respondents to adopt him. He submits that the information will enable him trace his biological parents in a bid to regain his dignity.

13. The third Respondent denied in the Replying Affidavit that it played any role in the Petitioners' adoption and asserts that it only came to know about the Petitioner in these proceedings.

14. The Petitioners' plea for information to enable him trace his biological parents and the circumstances pertaining to his adoption raises a fundamental issue, namely, whether an adopted child has a right to know his or her biological parents. Perhaps, this was the question in the mind of **R.S. Aderson** when he said:-

"I seem to have a compelling need to know my own story. It is a story that I should not be excluded from since it is at least partly mine, and it seems vaguely tragic and somehow unjust that it remains unknown to me." [4]

15. **Jayna Kothari**, in her article entitled *"The Child's Right to Identity: Do Adopted Children have the Right to know their Parentage?"* [5] starts by narrating the following the story of a one **Steve Jobs** which I find appropriate to reproduce below:-

"Steve Jobs in his famous commencement speech at Stanford University in 2005 spoke about his biological mother, who was a young unwed college graduate. She decided to give him up for adoption and wanted him to be adopted by college graduates. While it is known that Steve Jobs was not reunited with his biological parents, in his reflections on his education and college life, one can see how significantly he is shaped by his identity as a person who was adopted and that his biological identity is as much a part of his life as is his adopted identity.

Jobs was one of the few adopted persons who knew the identity of his biological parents. Knowing one's parents' is something most of us take for granted. However, this information which is critical to the formation of our identity is often inaccessible to most adopted children, who do not know who their biological parents are. [6]

16. Before addressing this issue further, and in particular the question whether or not the Petitioner has provided evidence to warrant the above order, I propose first to examine the applicable law, principles and jurisprudence on the subject.

17. Whereas the law in Kenya merely provides for adoption, it does not address any concerns or the rights of adopted children to know:- **(i)** the identity of their biological parents, **(ii)** the circumstances leading to their adoption, and **(iii)** the suitability of the adopting parents. Whereas pertinent questions are determined by the court handling the adoption, there is no provision stating that such information may be provided to the child either during minority or upon attaining the age of majority. Part **X11** of the Children's Act [7] lays down parameters as to who can adopt and under what conditions, but other than parental rights, it does not address pertinent rights of the adopted child such as the right to identity, the right to be informed about his or her biological parents, the right to be informed the circumstances leading to his adoption, the right to know the whereabouts of her/his biological parents or the suitability of the adopting parents.

18. Every person has the right to know where they came from and their family lineage. A big dilemma however arises in adoption cases. Do adopted children have a right to know their origin? Adoption processes throughout the world are shrouded in secrecy, perhaps due to the sensitive nature of the relationship that is being severed or created out of the adoption exercise. The Children's Act [8] is silent on the question of whether or not adopted children have a right to know their origin or any of the above questions. Further, the act is silent on if at all they have a right, what information they can access and what they cannot and at what age. The information on the origin of the child is in the custody of the government and adoption agencies and the court handling the adoption. This lacuna in our law leads me to resort to international law as a source of law in Kenya. [9]

19. The Convention on the rights of the child, Article **8** provides that States Parties [10] should undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. It further provides that where the child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. Article **30** of the same convention provides that the competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. It requires State parties to ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

20. The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, Article 9 thereof provides that the need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests.

21. The law in the United Kingdom provides that children can apply for a copy of their original birth certificate and for information about their birth family from the adoption agency, which arranged the adoption. Adult adoptees and birth family members can also apply to the Registrar General for entry of their names on the Adoption Contact Register which includes the names of adopted persons and the relatives of adopted persons. In other Jurisdictions, the right is guaranteed once one reaches the age of majority.

22. Addressing the question whether the adopted child has the right to know about his / her biological parents, the Supreme Court of India stated:-

“...from the child study report would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the ... adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the... adoptive parents whether and if so when , to inform the child about its biological parents...But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child has attained maturity, it is not likely to be easily affected by such information and in such a case, the ...adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.” [\[11\]](#)

23. The Supreme Court of India while recognizing the need that adoptee children may have to know about their biological parents, put the burden of releasing such information to the adoptive parents, to decide based on their discretion as to when such information can be released to the child. The Court, interestingly, did not qualify the release of such information to an adult, but instead mentions that it could be released even to a “child” who has reached maturity. It mandates that the adoption agency releases such identifying information to the adoptive parents, who would then be free to release this information to the child, once the adopted child is mature and old enough to deal with the same. [\[12\]](#)

24. In Kenya, when issues of the need for the child to know the biological parents arises, we can refer to the Constitution for reference and guidance. Article 35 of the constitution provides that every citizen has the right of access to information held by the state, information held by another person and required for the exercise or protection of any right or fundamental freedom. Information regarding adoption of children in Kenya is held by the state and adoption agencies. Article 35 in my view enables the child either during the age of minority through her legal guardian or after attaining the age of majority to apply to be furnished with information about their biological parents.

25. Article 31 of the Constitution provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. This provision brings about a competition of rights and interests. The biological parents of the child have the right to have their matters kept in secrecy but the child on the other hand has the right to the information and to know their true identities. Article 53 of the constitution provides that the best interest of the child is of paramount importance in all matters affecting the child. Children adoptees have a right to know the identity of their parents, the parent's origin and the existence if any of their siblings.

26. This leads me to the question- Is it possible to formulate a fundamental right to identity that can enable an adopted child to seek information about his/her birth parents? If so, what would the contours of this right be? In order to address this, we first need to understand what is the true need to find out one's parentage and roots, and whether such a need would satisfy the requirements of Article 35 (1) (b), that is, the information sought is aimed at exercising or protection of a fundamental right.

27. In pursuing the right to know one's origins as a fundamental right, three interests as discussed below emerge, medical, legal and genetic. Also, when enjoying the right, one must strike a balance between the need for one to know the biological parents, and protection of confidentiality/privacy of the biological and adopting parents.

28. *First* is the Right to Identity and the Need to Know One's Origins. The need to know one's parentage and background is crucial to children and adults who do not have this information. This right to know one's origins means having the information and identity of one's biological parents and conditions of birth. The right to know stems from the desire to know the identity of self.[13] Social scientists have considered the meaning of identity to be determined by three main aspects:- *self-definition, coherence of personality and a sense of continuity over time.*[14] Identity is thus seen as essentially "*self-in-context.*"[15] This means that identity is often determined by social changes and one's definition of self is affected by how a relationship is seen in the social context. Adoption transgresses our notions of identity"[16] and the journey of identity development is complex and problematic for adopted persons.[17] Adoption is governed by different kinds of social arrangements, these arrangements have implications on the development of the identity of the child.[18]

29. Many adopted persons feel the need to know information about their birth parents. This need translates to an assertion of the right to know one's origins. According to **Katherine O'Donovan** there are three main needs to have this information -[19] "*First* there is often the desire to know one's medical and health history and for this purpose knowing the medical history of one's parents and ancestors becomes important. The *second* interest is one's legal interest in property, which blood relationship may confer on children. These two interests are subsidiary interests. The primary interest really is the *third*, which is a psychological need for identity. The psychological need to know one's roots or identity is found to be the most important reason as to why adoptees want to know about their biological parents since it underlies the need to know and can shape the identity of an adopted person.

30. **Triseliotis** in his well-known study of 1984 with adoptees, documents that "It can now be claimed with some confidence from the available evidence that there is a psychological need in all people, manifest principally among those who grow up away from their original families, to know about their background, their genealogy, and their personal history, if they are to grow up feeling complete and whole." [20] Another study done in 1985 found that the "idea of the importance of blood ties and genes is common to most people and they feel profoundly deracinated if brought up with no knowledge of their blood origins." [21] This psychological need to know one's origins has now been recognized as "*sufficiently fundamental or vital to give rise to a human right.*" [22] Many researchers have agreed with this that it is indeed an important element in one's psychological balance to know where one comes from and that everyone of us has a right to know the truth about one's origins.[23]

31. Adopted persons who do not have information about their roots often have difficulty establishing a personal identity. Problems with identity formation are particularly acute during adolescence and at crisis points in adulthood.[24] Thus, adoptees claim that sealed records deny them full autonomy and the means to develop a sense of self which is essential to a healthy and satisfying life. A diminished sense of self is also related to "genealogical bewilderment." [25] "Genealogical bewilderment" may occur when children either do not have any knowledge of their biological parents or possess only uncertain knowledge and the resulting state of confusion and uncertainty 'fundamentally undermines children's sense of security, thus affecting their mental health.' [26] In addition to the psychological need, medical crises also often precipitate the need for information about biological relatives. Ranging from allergies to searches for transplant donors, medical needs can leave adoptees without sufficient information to get proper treatment. Short of a crisis, impending marriage and childbearing lead to concerns about genetic disease and hereditary traits.[27] Other reasons for open records advanced by adoptees include inheritance rights, [28] religion,[29] and simply a longing to meet their birth parents.[30]

32. It is beyond doubt that there is an international recognition of the Child's Right to Identity as a fundamental right. This psychological need to know one's identity has been articulated as a right in the Convention for the Rights of the Child 1989 (CRC) in Articles 7 and 8. Article 8 provides:-

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where the child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

33. The CRC has gone on to protect several rights of the child, such as the right to identity that were not recognized as fundamental human rights before, a recognition that it is a right worthy of international recognition.^[31]“Identity” is not defined under the CRC and only instances of identity such as nationality, name and family relations are listed. Article 8 was particularly meant to address unusual conditions such as natural parents versus adoptive parents and other such conditions.^[32] Article 8, therefore imposes an obligation on the State to not only preserve the identity of a child i.e. to preserve all the information relating to the biological parents of the adopted child, but also not to deprive the child of such information and to assist the child in getting such information. The CRC thus affirms that an adoptee can seek a right against the State or any person for providing him/her information about her identity and about her biological parents. In addition to the CRC, the child’s right to know her identity is also protected in the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption. In Article 30, it requires State authorities to ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved and that the child or his or her representative has access to such information, under appropriate guidance, in so far as it is permitted by law in that State. Article 30 states as follows:-

(1) The competent authorities of a contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as it is permitted by the law of that State.”

34. The child’s right to know his or her origins is derived from the general right to privacy guaranteed under Article 17 of the International Covenant on Civil and Political Rights 1966. The right to privacy would include the right to know and receive information of one’s family and private life and guarantees against arbitrary interference with the same. The right to privacy and family life is also guaranteed under Article 8 of the European Convention of Human Rights.

35. And finally, this need of the child to know about her background was recognized in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally in Article 9 which states that the need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests.

36. The question that arises in the Kenyan context, is whether in the best interests of the child, or after attaining the age of majority the information of his or her background and the identifying information about his/her biological parents can be released? Can this be articulated as a fundamental ‘right’ guaranteed in the Bill of Rights? If so, then what should be the parameters for guiding the authorities or the courts while ordering such release or enforcing this right? Are there competing rights such as the right to privacy for the biological parents and the adopting parents. All these rights must be balanced. With these competing interests courts are obligated to ensure that the ‘best interests of the child’ if still a minor prevail over all interests of all other parties. On the other hand, where the child has attained the age of majority as in the present case, the reasons for refusal to supply the information must satisfy the Article 24 analysis test.

37. It is beyond argument that the law in Kenya is in favour of the disclosure. First, the Adopted person has a constitutional right to dignity and privacy which includes to know ones biological parents. By insisting on the information, the person is seeking to exercise fundamentals right recognized in our

Constitution and international Instruments discussed above. Article 35 of the constitution provides that every citizen has the right of access to information held by the state, information held by another person and required for the exercise or protection of any right or fundamental freedom. Information regarding adoption of children in Kenya is held by the state and adoption agencies. The only limitation in the case of a minor would be "the best interests" of the child contemplated under Article 53 (2) of the Constitution. For an adult as in the present case, the reasons for refusal can only pass constitutional muster if they satisfy Article 24 test. For example, the need to ensure that the disclosure does not prejudice the rights and fundamental freedoms of others. Examples here would include the right to privacy of the biological parents and the Adoptive parents, but even then, the burden lies on the person seeking to justify the limitation to demonstrate to the Court that the requirements of Article 24 have been satisfied.

38. The Petitioner seeks the information from the third Respondent, claiming it is the body that facilitated his adoption. The third Respondent has vehemently denied ever having been involved in the adoption. It states that it only came to know the Petitioner in this Petition.

39. Unfortunately, the Petitioner did not avail any documents or evidence to connect the third Respondent with the adoption. There is no material before the Court to demonstrate that the third Respondent handled the adoption in question or has in its custody, care or control the information sought. The adoption was done in court. The Petitioner did not avail the court proceedings, judgment and documents produced in court in the adoption proceedings to demonstrate that indeed the third Respondent was involved in the Adoption. The Court has on one side his averments and a denial by the third Respondent and it is expected to make a determination.

40. Section 107 (1) of the Evidence Act^[33] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

41. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:-^[34]

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

42. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*^[35] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

43. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

44. Also relevant is the fact that there is no evidence that the Petitioner ever requested the information in question from the third Respondent or any of the Respondents and was denied. The holding in *Kituo Cha Sheria & another vs. Central Bank of Kenya & 8 others*^[36] is relevant:-

"There must be a request for information before a party entitled to that information can allege

violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.”

45. Failure by the Petitioner to adduce evidence to link the third Respondent with the adoption leads me to the irresistible conclusion that there is no material for the court to conclude that the third Respondent handled the adoption in question or has in their custody, control or power the information sought. Consequently, the answer to the issue under consideration is in the negative.

(b) Whether this Petition is bad for mis-joinder of parties and for raising several causes of action

46. Counsel for the first and second Respondent citing numerous authorities and provisions of the Civil Procedure Rules argued that this Petition is bad for mis-joinder and mis-joinder of issues. The third Respondents' counsel submitted that this Petition is an abuse of court process, it is frivolous and vexatious.[\[37\]](#)

47. In reply to the above submissions, counsel for the Petitioner argued that a Petition cannot be defeated on account of mis-joinder which to me represents the correct exposition of the law. He also submitted that the Petitioner has made specific claims against the Respondents.

48. On the question of the alleged mis-joinder of parties and mis-joinder of issues, the first and second Respondents counsel cited provisions of the Civil Procedure Rules and heavily relied on decisions rendered in civil cases. He over looked the fact that this is a constitutional Petition seeking to enforce fundamental rights and that the same is expressed under the provisions of the Constitution. The proceedings are governed by *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.[\[38\]](#)

49. Rule 5(b) of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides states that:-

“A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”

50. It is evident both from the Constitution and the rules which require that substantive justice be done, the joinder, misjoinder or non-joinder of a party is not sufficient to defeat a constitutional Petition. Rule 5 (d) further makes clear, the Court can make substitutions, or require the joinder of a party either as a petitioner or respondent:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added”.

51. These rules are in accord with the requirements of the Constitution that in exercising judicial authority, the Court should seek to do substantive justice, hence the provisions of Article 159 (2)(d) of the Constitution which provide that *“justice shall be administered without undue regard to procedural technicalities.”* In the circumstances, I find that the objection premised on the alleged mis-joinder of Parties fails.

52. Counsel for the first and second Respondents also argued that the Petition raises several causes of action among them disclosure of circumstances of the Petitioners' adoption, identity of his biological parents, declaration of violation of constitutional rights all of which are distinct and do not arise from the

same transaction, hence, combining the same creates a confusion whereby the first and second Respondents do not know how to respond.

53. I find myself unable to agree with this submission. The request for information is founded on Article 35 of the Constitution. There are allegations of violation of Articles 27, 28, 29 and 45 of Constitution. I do not see how combining these issues create confusion to the first and second Respondents.

54. The core issue here is to understand the function and purpose of good pleadings. In this regard, I recall the words of the Australian Court^[39] where Vickery J said this of the principles of good pleading:-

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.^[40] (Emphasis supplied)

55. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

56. I am not persuaded that the pleading herein are so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against them. I refuse to agree that the issues raised in the Petition are confusing. The objection based on the said ground fails.

Whether the Petitioner has demonstrated violation of his Fundamental Rights under Articles 27, 28, 29 and 45 of the Constitution.

57. The Petitioner avers that his rights under Article 27, (Equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person) and Article 45 (family) have been violated in that the adopting parents adopted him under circumstances unknown to him, he has been denied parental compassion, love, care and support and hence undermined his dignity, security of the person, and right not to be discriminated.

58. Advancing the above averment, counsel for the Petitioner submitted that the Petitioner has been treated to inhuman and degrading treatment and no exceptional circumstances such as seriousness of a

crime a person is suspected of having committed can justify infliction of torture or inhuman or degrading treatment[41]and that the treatment is discriminatory. Counsel cites instances of discrimination allegedly subjected upon the Petitioner among them alleged denial of opportunity to visit Great Britain, alleged minimum financial support compared to other members of the family, an allegation of an indication that he will be disinherited, and lastly an alleged denial or infringement of the right to family.

59. Counsel for the first and Second Respondent submitted that the Petition does not disclose violation of constitutional rights[42] while the third Respondents' Counsel submitted that no evidence has been tendered to demonstrate that the third Respondent violated the Petitioners rights.

60. Each case depends on its facts and circumstances. It is not disputed that the Petitioner is an adopted son of the first and second Respondents. It is not disputed that the Petitioner was convicted by the Magistrates Court of the offence of robbery with violence. The victim of the robbery are his own adoptive parents. The conviction was upheld by the High Court. His appeal is pending in the Court of Appeal. He alleges that his adopted parents subjected him to different treatment from the other members of the family forcing him to flee from home. He cites refusal to visit the United Kingdom, failure to be granted financial and moral support and alleged refusal by his adopted parents as some of the instances of discrimination. He fears that he may be denied his inheritance rights.

61. To me the above reasons cannot meet the test to uphold a plea of discrimination, violation of dignity, violation of freedom and security and the right to belong to a family. The Petitioner is an adult in his late 30's or thereabouts. He cannot be heard to say he has a fundamental right to receive financial support from his parents or even to be facilitated to travel abroad as of right as he alleges. Failure to visit him in prison may be distressing. But the victims of the crime are his parents. They may be distressed too.

62. The apprehension that he may be disinherited remains a mere apprehension. Courts do not deal with hypothetical situations. Differently put, whether or not his fear of his right to inherit his parents can be canvassed in this Petition raises common law principles in relation to what were called abstract, academic or hypothetical questions. The principle is called ripeness, it prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of the conduct alleged to be unconstitutional.

63. This principle was aptly captured by **Kriegler J**[43] in the following words:-*“The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.”*

64. Lord Bridge of Harwich put it more succinctly when he stated:- *“It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.”*[44]It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.[45] The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[46] Ripeness asks whether a dispute exists, that is, whether it has come into being.

65. Even if a dispute on the alleged inheritance rights existed (which is not the case), before me is not a succession dispute but a constitutional Petition seeking declaration declarations premised on alleged violation of constitutional rights. A dispute premised on alleged inheritance right is a matter primarily to be determined in succession proceedings where beneficiaries are identified and their rights over the property (if any) determined.

66. While on the question of ripeness, the Petitioner invites the court to issue a "***A declaration*** that the Petitioner is part of the first and second Respondents family, despite not being their biological son and regardless of criminal proceedings against him and is consequently eligible to parental care, love and support and is entitled to enjoy the right to dignity, security of person, family and equality like other members of the family to the greatest extent possible.

67. The court is being asked to make a declaration on an issue where the Petitioner has not demonstrated that a dispute exists. There is nothing on record to show that the parents have denied, disowned the Petitioner as their son. Consistent with the above authorities, I find that Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved. The court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.

68. More fundamental is the fact the declaration sought if granted in this Petition, owing to the peculiar circumstances of this case, will be tantamount to determining succession rights or property rights or declaring the Petitioner a beneficiary which will have far reaching consequences because it will amount to encroaching in to the mandate of the succession court in the event of a succession dispute. Accordingly, my answer to the issue under consideration is in the negative.

Determination

69. In view of my analysis of the facts, the issues, the law and authorities enumerated above, I find that this petition has no merits and that the reliefs sought are unwarranted. Consequently, I dismiss this petition with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 18th day of April 2018

John M. Mativo

Judge

[1] Chapter 179 of the Laws of Kenya

[2] {1983} KLR 68

[3] Supra

[4] **R.S. Anderson**, 'Why Adoptees Search: Motives and More', (1988) 67 Child Welfare, 15-19.

[5] Available at https://www.cry.org/resources/pdf/NCRRF/NCRRF_ReportBy_Jayna.pdf. Accessed on 6 April 2018

[6] **S Besson**, 'Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 International Journal of Law, Policy and the Family 137.

[7] Act No. 8 of 2001, Sections 154 to 159

[8] Ibid

[9] Article 2 (5) of the Constitution.

[10] Kenya ratified the Convention on the Rights of the Child on 30 July 1990.

[11] *Lakshmi Kant Pandey v. Union of India*, 1984 AIR 469, para16.

[12] *Ibid*

[13] H D. Grotevant, N Dunbar, J K Kohler and A M. Lash Esau, 'Adoptive Identity: How Contexts within and beyond the Family Shape Developmental Pathways', (Oct., 2000) 49 (4) *Family Relations*, 379-387

[14]

Ibid

[15] *Ibid*

[16] B Yngveson, 'Geographies of Identity in Transnational Adoption' (Mine, Yours, Ours & Theirs Adoption and Changing Kinship and Family Patterns Conference, Oslo, May 1999).

[17] H D. Grotevant, N Dunbar, J K Kohler and A M. Lash Esau, 'Adoptive Identity: How Contexts within and beyond the Family Shape Developmental Pathways', (Oct., 2000) 49 (4) *Family Relations*, 379-387.

[18] *Ibid*

[19] K O'Donovan, 'A Right to Know One's Parentage?' (1988) 2 *International Journal of Law and the Family* 27.

[20] J Triseliotis and L Russell, *Hard to Place: The Outcome of Adoption and Residential Care*, (Heinemann Educational Books 1984).

[21] P Toynbee, *Lost Children*, (London Hutchinson 1985)

[22] M Freeman, 'The New Birth Right?: Identity and the Child of the Reproductive Revolution' 4 (3) *International Journal of Children's Rights* 273.

[23] *Ibid*

[24] Grotevant et. al (n 18).

[25] The term was first used by Wellisch as a significant factor in adoption stress: Wellisch, 'Children without Genealogy: A Problem of Adoption' (1952) *Mental Health* 13(1).

[26] Sants, 'Geneological Bewilderment in Children with Substitute Parents' in Bean (ed), *Adoption: Essays in Social Policy, Law and Psychology* (London Tavistock 1984) p. 67.

[27] Grotevant et. al (n 18).

[28] *Ibid*

[29] *Ibid*

[30] *Ibid*

[31] George A. Stewart, 'Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child', 1992-93, 26 *Family Law Quarterly*, 221.

[32] Ibid

[33] Cap 80, Laws of Kenya

[34] In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[35] {2007} 4 SLR (R) 855 at 59

[36] {2014} eKLR

[37] Counsel cited *Kiru Tea Factory Co. Ltd vs Joseph Gioche Kuria* {2016} eKLR; *Franklin Mithika Linturi vs Safaricom Ltd* {2009} eKLR; *Twin Buffalo Safaris Ltd vs Business Partners International Limited* {2015} eKLR; *OM Odhiambo Achillah T/A aCHILLA t.o. & Co. Advocates vs Kenneth Wabwire Akide T/A Akide & Co Adv & 3 Others* {2015} eKLR and *Bank of Credit & Commerce International*

[38] Legal Notice No. 117 of 28th June 2013

[39] In *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6]

[40] See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

[41] Counsel cited Supree Court of Zimbabwe decision in *Jestina Mukoko vs A.G* (36/09) {2012} zwsc 11 (20 March 2012), Constitutional Application No. 36 of 2009

[42] *Anarita Karimi Njeru vs Republic* {1979} KLR 154, *Patrick Chege Kinuthia & 2 Others vs A.G.* {2015} eKLR, *Trusted Society of Human Rights Alliance vs A.G & 2 Others* {2012} eKLR cited

[43] In *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) at paragraph [199]:

[44] In the case of *Ainsbury vS Millington* {1987} 1 All ER 929 (HL), which concluded at 930g: 13

[45] See *Transvaal Coal Owners Association vs Board o Control* 1921 TPD 447 at 452

[46] *Nuclear Tests (Australia vs. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58)